Filed 8/5/03 In re Stephanie M. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re STEPHANIE M., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. MARA C., Defendant and Appellant.	E032952 (Super.Ct.No. J090508) **OPINION**

APPEAL from the Superior Court of Riverside County. H. Dennis Myers, Judge. Affirmed.

Craig E. Arthur, under appointment by the Court of Appeal, for Defendant and Appellant.

William C. Katzenstein, County Counsel, and Julie A. Koons, Deputy County Counsel, for Plaintiff and Respondent.

Sharon S. Rollo, under appointment by the Court of Appeal, for Minor.

This appeal stems from the juvenile court's denial of Mother's Welfare and Institutions Code section 388 petition[1] as to her daughter, Stephanie M. Mother claims that in light of her changed circumstances the juvenile court abused its discretion when it denied her section 388 petition without a hearing. We find no abuse and will affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

The dependency case began on March 28, 1997, when Stephanie and her four siblings were taken to protective custody.[2] On April 1, 1997, the Riverside County Department of Public Social Services (DPSS) filed section 300 petitions on behalf of the children, alleging that Mother abused alcohol, had a history of substance abuse, was unable to maintain a stable residence despite being offered assistance, failed to ensure the children's attendance at school, was arrested and incarcerated for shoplifting, and failed to retrieve her children when she was released from jail. The petition also alleged that Stephanie was a prior dependent of Los Angeles County because she was born with drugs in her system. On April 2, 1997, the juvenile court detained Stephanie in out-of-home care and offered Mother supervised visitation.

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[1] All future statutory references are to the Welfare and Institutions Code unless otherwise stated.

[2] Stephanie's four siblings are not part of this appeal. Stephanie, who is currently 14 years old, is the second eldest child. Stephanie's three younger siblings were eventually placed in the care of their father, and their dependency case was terminated. Stephanie's older brother lived with Stephanie for most of the duration of the dependency case.

The social worker reported that Mother's friend, Kay B., had been caring for the five children for two to three weeks while Mother was homeless. Mother had been evicted from her residence, and the children had little to no clothing and had been unkempt. The older children changed the babies' diapers, the children were rarely given baths or fed nutritional meals, and the children's teeth had been decaying. Mother was described as being a drug user with a strong sexual drive. Kay informed the social worker that Mother was unfit and had not enrolled her children in school for over a year. Mother admitted to having an alcohol problem and to having used "speed" in the past. The biological father of the three younger children reported that Mother wanted the children in order to maintain her AFDC eligibility; that within three days, she spent the money she received from AFDC on "crack"; and that Mother may be prostituting herself.

On July 23, 1997, the petition was sustained, and Stephanie was declared a dependent of the court. Custody was removed from Mother, and the court ordered family reunification services.

The six-month review report dated January 20, 1998, indicated that Mother had been incarcerated since November 18, 1997, for petty theft. She had also been incarcerated from August 1, 1997, to October 3, 1997. During her incarceration, she was involved in a work program and was taking a computer class. She had also completed 36 hours of parenting instruction and had participated in anger management. She had entered a drug treatment program but was terminated from the program in July 1997. She had two jail visits with Stephanie, and the visits had gone well.

On January 23, 1998, the juvenile court found that it would be detrimental to return Stephanie to her mother's care and custody. Stephanie was continued as a dependent of the court, and Mother was offered additional family reunification services. The court also ordered visitation for Mother during her incarceration.

By March 24, 1998, while in jail, Mother had completed a codependency workshop and an AIDS prevention class.

At the placement hearing, the court authorized a 30-day placement of Stephanie and her brother with their maternal aunt and uncle in Las Vegas, Nevada.

A report dated July 15, 1998, indicated that Mother had been residing in a hotel with her boyfriend since July 3, 1998; that after her release from jail she failed to appear for a probation hearing, and a bench warrant was issued; and that she reluctantly admitted to a drinking problem. Mother had about six different visits with Stephanie, which went fairly well. Stephanie continued to live with her aunt and uncle in Las Vegas and was doing well. Mother had not visited Stephanie there but had been calling while she was intoxicated.

On August 26, 1998, Mother was not present in court for a contested hearing. The court allowed Stephanie and her brother to remain with their aunt and uncle in Las Vegas. Family reunification services were terminated, and a review hearing for all five children was set for March 11, 1999.

A review report dated March 11, 1999, indicated that Stephanie and her brother remained with their aunt and uncle, that Stephanie wanted to remain there, that Mother was incarcerated in state prison, that Mother had occasional contact with Stephanie

through telephone calls and letters, and that the caretakers were interested in adopting Stephanie and her brother.

At the March 11, 1999, review hearing, Mother was not present in court. After the court admitted the social worker's report into evidence, the matter was set for a selection and implementation hearing pursuant to section 366.26.

A section 366.26 report indicated that Stephanie and her brother remained with their relative caretakers in Las Vegas, that the children wanted to be adopted, and that the caretakers were willing to adopt the children. Stephanie had limited and infrequent telephone contact with her mother. Mother had been released from state prison in April 1999 but chose not to travel to Las Vegas to visit the children, even though the social worker opined that it would be in the children's best interests to have continued contact with their mother, and the caretakers expressed an interest in allowing continued visitation for Mother.

The section 366.26 hearing was eventually held on January 18, 2000. Mother was not present, and the court terminated her parental rights and referred the parties to mediation to discuss a kinship adoption.

By July 2000, Stephanie and her brother were still residing with their aunt and uncle, but the family had moved to Apple Valley, California. Stephanie would become upset over the telephone calls with Mother, and her brother refused telephone contact with Mother. Stephanie had not had any in-person visits with her mother. In August 2000, the adoption process had to be restarted, since the family had moved to California.

A January 17, 2001, review report indicated that Stephanie and her brother continued to reside with their caretakers in Apple Valley, that the caretakers were having significant financial hardship, that Stephanie was struggling in school, and that Stephanie and her brother continued to express a desire to be adopted.

As of July 2001, Stephanie and her brother continued to reside with their relative caretakers. The caretakers continued to have financial hardship. They were living off the income they received from foster care payment; they had trouble paying their utilities and buying food. Hence, the adoptive home study was not approved by DPSS. Stephanie continued to struggle in school and had started a pattern of stealing and lying. She had not had any visits with her mother.

On July 17, 2001, the court held a review hearing and continued the permanent plan of adoption. The court ordered DPSS to provide counseling and tutoring for Stephanie. The following day, Stephanie cut her clothing, upset by the possibility that she might be moved from her aunt and uncle's home.

On July 16, 2001, DPSS received a referral that Stephanie and her brother were stealing from their neighbors, were allowed to drink alcohol and smoke marijuana, and were under poor supervision. When interviewed by the social worker, the children denied using marijuana and alcohol. Stephanie, however, admitted that she stole $150 from a neighbor and that she and her brother broke into a neighbor's garage and stole items. The caretakers were upset with Stephanie's defiant behavior and her "I don't care" attitude; after Stephanie made allegations that the caretakers' adult son, who did not

reside in the home, raped her four years earlier, the caretakers asked for Stephanie's removal.

On July 26, 2001, DPSS filed an ex parte application seeking an order for placement of Stephanie in a group home and an order downgrading her permanent plan from adoption to long-term foster care. On that same day, the juvenile court denied DPSS's requested relief.

On August 8, 2001, the court granted DPSS's limited request for an order for group home placement. On September 12, 2001, the court granted DPSS's request that Stephanie's permanent plan be downgraded from adoption to long-term foster care.

A status review report dated January 23, 2002, indicated that Stephanie continued to reside in a group home and that in November 2001 she disclosed to her therapist that her brother had sexually abused her when she was living with her aunt and uncle. Stephanie was in good health and continued to receive tutoring. She had been suspended from school "indefinitely" due to a verbal altercation with the bus driver; she suffered from depression, mood instability, and poor self-esteem; and she was taking medication and received individual and group counseling. The social worker recommended a continued plan of long-term foster care.

In June 2002, Mother contacted the social worker and indicated a desire to have Stephanie back. The social worker told Mother to go to court to research her options.

By July 2002, Stephanie, still residing in the group home, continued to struggle both behaviorally and academically in school. She was due to appear in juvenile court on July 17, 2002, regarding a theft that had occurred in October 2001. Although Stephanie

had made significant improvements in her mental and emotional status, she began taking psychotropic medications, had problems with compulsive behavior, and had attempted to run away.

On October 9, 2002, Mother, in propria persona, filed a section 388 petition. She alleged that she had completed a six-month residential treatment program and was residing in a sober living facility. She was requesting contact with Stephanie and placement of Stephanie in her home once she secured stable housing. The juvenile court denied the petition without a hearing.

On November 3, 2002, Mother, in propria persona, filed another section 388 petition. The second petition was similar to the first, but this time Mother also alleged that she was actively involved in narcotics anonymous meetings. Mother again requested contact with Stephanie and "modification of decision concerning parental rights." The petition was again denied without a hearing.

On December 23, 2002, Mother filed a timely notice of appeal from the juvenile court's denial of the November 3, 2002, section 388 petition.

II

DISCUSSION

Mother contends the juvenile court abused its discretion when it denied her section 388 petition without a hearing. Specifically, she argues the court erred in refusing to hold a hearing on her section 388 petition because she made a prima facie showing of changed circumstances, and she established that reunification was in Stephanie's best interests. We disagree.

Section 388, subdivision (a) provides in pertinent part: "Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made . . . ." The petition must be verified and "shall set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order or termination of jurisdiction." (*Ibid*.) Subdivision (c) of section 388 states: "If it appears that the best interests of the child may be promoted by the proposed change of order . . . the court shall order that a hearing be held and shall give prior notice . . . ."

California Rules of Court, rule 1432(b) states: "If the petition fails to state a change of circumstance or new evidence that might require a change of order or termination of jurisdiction, the court may deny the application ex parte."

The parent seeking modification must "make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]" (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310; *In re Jeremy W*. (1992) 3 Cal.App.4th 1407, 1412-1414.) There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and (2) that revoking the previous order would be in the best interests of the child. (*In re James Q.* (2000) 81 Cal.App.4th 255, 264; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.) Hence, "[t]he petition under section 388 can be denied ex parte only if it fails to make a prima facie showing of change of circumstances or new evidence that suggests the proposed change of order would

promote the best interest of the child. [Citation.]" (*In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 323.)

Our Supreme Court upheld this scheme in *In re Marilyn H.*, *supra*, 5 Cal.4th 295 and explained: "Shifting the burden to the parent to file a petition based on a showing of change in circumstance is not unduly burdensome. Such petitions are to be liberally construed in favor of granting a hearing to consider the parent's request. [Citations.] The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing [on the petition]. [Citation.]" (*Id*. at pp. 309-310; see also *In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Michael D.* (1996) 51 Cal.App.4th 1074, 1083; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 806-807; *In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1798-1799; *In re Edward H.* (1996) 43 Cal.App.4th 584, 592.) We review the juvenile court's summary denial of a section 388 petition for abuse of discretion. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

Initially, we note that Mother's petition failed to state her relationship or interest in Stephanie as required by section 388. Although in her petition she stated that she is the mother of Stephanie, Mother's parental rights were terminated on January 18, 2000. Accordingly, Mother is no longer the legal parent, or even a legal guardian, to Stephanie.

Moreover, Mother is precluded from modifying the order terminating her parental rights via a section 388 petition. Pursuant to section 366.26, subdivision (i), "the Legislature has expressly prohibited the collateral dispute of a termination order." (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1161.) Furthermore, a juvenile court has no power to modify an order terminating parental rights. Section 366.26, subdivision (i)

provides in pertinent part, "Any order of the court permanently terminating parental rights under this section shall be conclusive and binding upon the child [and] upon the parent or parents . . . . *After making the order, the court shall have no power to set aside, change, or modify it, but nothing in this section shall be construed to limit the right to appeal the order*." (Italics added.) Mother did not appeal from the order terminating her rights, and that order has long been final.

As the court in *In re Ronald V.* (1993) 13 Cal.App.4th 1803 found, having failed to appeal from the termination order, Mother's petition to modify the permanency planning order was in substance a collateral attack on the termination of her parental rights. (*Id*. at pp. 1805-1806.) She was asking the court to give her visitation rights. "She was, in short, asking the juvenile court to do what it no longer had the jurisdiction to do -- namely to undo the termination of her parental rights . . . ." (*Id.* at p. 1806.) Subdivision (i) of section 366.26 specifically states that once the termination order issues the court has "no power" to "modify it." The juvenile court thus had no jurisdiction to hear the section 388 petition, because in this instance the petition was nothing more than a collateral attack, made after the time to appeal had elapsed, on the order terminating parental rights. Accordingly, as minor's letter brief notes, Mother's progress or lack thereof was irrelevant once her parental rights had been terminated. The lower court properly denied Mother's section 388 petition without a hearing.

Even if Mother's collateral attack of the order terminating her parental rights is not a fatal defect to her section 388 petition and Mother has "an interest" in the child, Mother failed to make the showing necessary to obtain a hearing. The petition may not be

conclusory. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) "[S]pecific allegations describing the evidence constituting the proffered changed circumstances or new evidence" is required. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) "A 'prima facie' showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited. [Citation.] If a petitioner could get by with general, conclusory allegations, there would be no need for an initial determination by the juvenile court about whether an evidentiary hearing was warranted. In such circumstances, the decision to grant a hearing on a section 388 petition would be nothing more than a pointless formality." (*Ibid*.) "Successful petitions have included declarations or other attachments which demonstrate the showing the petitioner will make at a hearing of the change in circumstances or new evidence." (*In re Anthony W.* at p. 250.) For example, in *In re Jeremy W.*, *supra*, 3 Cal.App.4th 1407, not only had the department's reports evidenced the alleged change in circumstances, but the mother's declarations attached to her section 388 petition directly addressed deficiencies in the reports, justifying a hearing on the section 388 petition. (*Id*. at pp. 1413-1415.)

Mother relies on *In re Hashem H.*, *supra*, 45 Cal.App.4th 1791. However, unlike in that case, where the petitioning parent described her continuous participation in therapy and attached a letter from her therapist describing the mother's progress in therapy and her ability to care for the child, here Mother presented no specific information; she did not attach any documents in support of her petition or provide names or dates. (See *id*. at p. 1796.) Hence, Mother made no showing she could demonstrate at

a hearing that she had overcome the problems which led to the dependency jurisdiction. (See *id*. at p. 1799-1800.)

Here, Mother merely asserted that she had "completed a 6 [month] residential program, is currently in Sober Living and actively involved in [narcotics anonymous]." These statements are conclusory. No mention is made of dates or names of counselors. The assertions are unsupported by any evidence such as certificates of completion or drug test results. (*In re Edward H.*, *supra*, 43 Cal.App.4th at p. 593.) Mother bore the responsibility in the first instance, as moving party, to make a prima facie showing, which she failed to do. Mother failed to make a showing of changed circumstances. Mother's statements in her petition were nothing more than assertions entirely unsubstantiated by even a declaration. Furthermore, it appears the circumstances that led to Mother's termination of her parental rights had not changed given that she had an open DPSS case in San Bernardino County involving other children.

Mother's petition also does not demonstrate how a change in the order would be in Stephanie's best interests. (*In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 529.) Mother asserts in her petition that Stephanie needs her mother. However, the record shows that Mother had not visited Stephanie since July 1998, even before family reunification services and parental rights were terminated. Additionally, since at least October 1998, Stephanie had limited and infrequent telephone contact with Mother. Even if, as minor's letter brief points out, Stephanie wanted to live with her mother and they talked frequently, Mother made no showing how it would be Stephanie's best interests to visit with Mother or to live with Mother, who has a long history of drug and alcohol addiction

and a recurring pattern of incarceration, given Stephanie's need for higher care. There was no abuse of discretion in denying Mother's section 388 petition without a hearing.

III

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P.J.

GAUT
J.